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Supreme Court, U.S.
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NO. 93-1941

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

NISQUALLY INDIAN TRIBE,

Petitioner,

v.

CULLEN AND CULLEN,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I.

INTRODUCTION

There is nothing about this lawsuit that calls for review by the United States Supreme Court. It is, simply, a contract dispute governed by long-standing principles of state law. No issue of great public importance is presented. The lower court rulings rest almost entirely on the facts of this particular case rather than on any new or remarkable pronouncement of law. The public interest will be so little affected by the outcome of this litigation that neither the District Court nor the Ninth Circuit Court of Appeals saw fit even to publish their opinions. Petitioner lost in the trial court and in the Ninth Circuit for the simple reason that it failed to present any persuasive evidence supporting its contentions. Under these circumstances, no useful purpose would be served by issuance of a writ of certiorari.

II.

STATEMENT OF THE CASE

This matter involves a dispute between a client (the Nisqually Indian Tribe) and its attorneys (Cullen & Cullen and other associated attorneys) at the conclusion of successful litigation spanning a period of more than 15 years.

The relationship between the Tribe and its attorneys was governed by a series of contingent fee agreements. The final contingent fee contract, dated June 4, 1981, was for a period of ten years. CR 235, Lyon Aff., Ex. 1. That contract required the attorneys to prosecute claims against the cities of Tacoma and Centralia arising from the adverse impact of the cities' Nisqually River hydroelectric projects on the Tribe's fishing rights. The contract provided for an attorneys' fee based upon a percentage of the amount of the recovery realized on behalf of the Tribe, subject to a maximum of $2 million on any recovery of $20 million or more.

The attorneys successfully and completely performed their obligations under the contingent fee contract. For ten years following execution of the 1981 contract, the attorneys prosecuted the litigation before FERC, the United States District Court and through three appeals to the Ninth Circuit. Several thousands of attorney hours were expended in bringing the litigation to a successful conclusion.

In September 1987, the attorneys and the Tribe were able to negotiate a favorable settlement with the City of Tacoma involving numerous provisions for the benefit of the Tribe: large cash payments; the setting of permanent flows on the Nisqually River for fish protection; joint efforts to seek additional federal funding; Tribal access to the city's professionals for consulting and to the city's jobs and job training programs for Tribal members; and the city's support for federal funding projects sought by the Tribe. CR 235, Ex. 14. The Tribe, with the assistance of the city's economist, determined that the present value of the Tacoma

settlement was $15.6 million. CR 296 at 25; CR 299, L. Sanchez Tr. 23-24; CR 297, Ex. 5.

On November 2, 1990, following the completion of a successful appeal to the Ninth Circuit, a settlement was reached with the city of Centralia. That settlement was described by the Chairman of the Tribe's Business Committee as "very beneficial to the Tribe." CR 297, Ex. 12. Working with the consulting firm of CH_2MHill, the staff of the Tribe's negotiating team valued the Centralia settlement at approximately $10 million. CR 299, Scott Tr. 29-30, 32, Mercado Tr. 19-20.

Under the terms of the contingent fee agreement, the combined value of the Tacoma and Centralia settlements, $25.6 million, entitled the attorneys to the maximum fee of $2 million. This entitlement was expressly acknowledged by the Tribe. Following the Tacoma settlement, the Tribe's Business Committee unanimously adopted a resolution that "the present value of the [Tacoma] settlement entitles the

attorneys to a fee award of $1.78 million." CR 297, Ex. 5. By letter of November 20, 1990, the Chairman of the Business Committee advised the Tribe that the additional settlement value realized through the agreement with Centralia increased the attorneys' fee entitlement to the contractual maximum of $2 million. CR. 297, Ex. 12.

The Tribe was fully satisfied with the legal representation provided by the attorneys. Over the more than 15-year life of the Tacoma/Centralia litigation, the Tribe never complained about any aspect of the attorneys' work. CR 235. By Resolution of October 25, 1989, the Tribe's Business Committee explicitly expressed satisfaction with the attorneys' services. CR 297, Ex. 4 at 2-4. Upon conclusion of the litigation, the Chairman of the Tribe's Business Committee praised the work of the attorneys in a letter to members of the Tribe. CR 297, Ex. 12.

In April 1991, the Tribe, for the first time, informed the attorneys that it intended to dispute the enforceability of

the contingent fee agreement and the attorneys' entitlement to a fee under that contract. CR 284, Ex. 22 at 235. By that time, the attorneys had performed and the Tribe had received the benefit of ten years of legal services under the 1981 contract, the litigation had been concluded upon terms that were "very beneficial to the Tribe," and the Tribe had already acknowledged in writing the attorneys' entitlement to a $2 million fee.

On May 3, 1991, the Tribe filed in the United States District Court for the Western District of Washington a motion to quash the lien filed by the attorneys in the amount of the unpaid fee. CR 224. The Tribal Attorney, without any evidence to support such an extravagant allegation, accused the attorneys of "a level of attorney misconduct unprecedented in the reported Washington case law." CR 285 at 42. He told the District Court that the 1981 contingent fee contract was void for lack of consideration,

when, in fact, the record clearly showed that there was ample consideration.

The District Court, upon cross-motions for summary judgment, ruled that the undisputed evidence supported, in every respect, the attorneys' entitlement to the maximum fee permitted by the 1981 contract. CR 313. It is apparent from the District Court's opinion that the fatal flaw in the Tribe's position was the total lack of any evidence to support it. For example, in rejecting the Tribe's contention that the attorneys should be deprived of their fee because of breaches of fiduciary duties, the Court found that there was no evidence of any such breach:

> The Court finds no basis in the record for charges of misconduct such that the Firm's fee should be reduced, especially in light of the value conferred on the Tribe by the Firm. The Firm worked on behalf of the Tribe for many years, without complaint from the Tribe until a successful result had been achieved, and the Firm sought its contractual fees.

CR 313 at 11 (emphasis added).

The Tribe appealed to the Ninth Circuit. The Court of Appeals, in affirming the District Court's decision, also remarked on the absence of evidence supporting the Tribe's arguments. Court of Appeals Memorandum, Appendix A to Tribe's Petition, at 3a-4a, n.1.

In seeking a writ of certiorari, the Tribe presents a fictionalized description of the facts.[1] The Tribe attempts to convince the Court that the attorneys inflated the values placed on the Tacoma and Centralia settlements, concealed from the Tribe how the fee was to be calculated, coerced the Tribe into accepting the inflated figures and, thereby, caused the Tribe to agree to an improperly high fee. There is no truth to any of this. Both the District Court and the Ninth Circuit, after thoroughly reviewing the record, found that there was no evidence supporting the Tribe's contentions.

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[1]It is noteworthy that the opening sentence in the Tribe's Statement of the Case —— that "The material facts are undisputed" —— precedes a recitation of factual allegations by the Tribe which were disputed by respondent below and rejected as unsubstantiated by the trial court and the Court of Appeals. See Court of Appeals Memorandum and District Court Order, pp. 3a-4a, 12a-14a to Tribe's Petition.

The record, in fact, shows that the Tribe itself dictated how the attorneys' fee was to be calculated and was fully informed as to how that calculation was performed. The settlement negotiations with the cities were controlled by the Tribe. CR 235 at 8. The Chairman of the Tribe, at the conclusion of the negotiations, insisted upon the calculation of the present value of the settlements. CR 296 at 25; CR 235 at 18. The Tribe, with the assistance of the cities' consultants, calculated the present value of the combined settlements to be $25.6 million. CR 235 at 10; CR 299, Scott Tr. 29-30, 32, Mercado Tr. 19-20. Tribal leaders used these present value figures when presenting the settlements for approval by the membership of the Tribe. CR 299, Scott Tr. 18-19, 32, Mercado Tr. 19-20; CR 297, Ex. 2. At the time of approving the settlements, it was the expectation and intention of the Tribe that these same present value figures would also be used in calculating the attorneys' fees. CR 299, D. Sanchez Tr. 52.

The fees were calculated in precisely the way that the Tribe anticipated and wanted. The percentages set forth in the contingent fee contract were applied to the present values assigned to the settlements by the Tribe. The calculation was fully described by the attorneys to the Tribe at a meeting called and run by the Tribal Chairman. CR 299, D. Sanchez Tr. 38-39, CR 235 at 12. The calculation of the fee resulting from the Tacoma settlement was approved by a unanimous vote of the Tribe's Business Committee. CR 297, Ex. 5. Following the Centralia settlement, the Tribal Chairman confirmed the attorneys' entitlement to the maximum fee of $2 million, apparently based upon his own calculation. CR 297, Ex. 12. The Tribe's present allegations that the fee calculation was forced upon them by the attorneys are a fabrication, totally unsupported by the record.

In its effort to obtain Supreme Court review, the Tribe also mischaracterizes the lower court rulings. The Tribe claims that the District Court held that "the attorneys

had no duty of full disclosure in fixing their fees." Petition at 23. But the District Court made no such holding. Neither the attorneys nor the trial court ever disputed that the attorneys had the obligations of a fiduciary, including a duty of disclosure, in connection with the setting of the attorneys' fee. The District Court ruled against the Tribe, not on the basis of any holding that no duty existed, but instead because there was no evidence that the duty had been breached. See District Court Order, Appendix B to the Tribe's Petition at 12a-14a.[2] The Court of Appeals expressly acknowledged that a duty of disclosure existed, but, like the District Court, rejected the Tribe's allegations that the record showed a breach of that duty. Court of Appeal Memorandum, Appendix A to Tribe's Petition at 3a-5a.

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[2]The District Court did reject the Tribe's contention that Perez v. Pappas, 98 Wash. 2d 835, 659 P.2d 475 (1983), imposed a duty upon the attorneys to advise the Tribe that "present values of structured settlements require complex analysis using calculations best understood by an economist," a contention that finds no support in Perez or any other Washington case.

The Tribe also erroneously contends that the District Court held that "the Tribe's resolution [acknowledging the attorneys' entitlement to their fee] foreclosed the Tribe's ability to challenge the firm's fees." Petition at 23. Again, the District Court made no such holding. Understandably, in reviewing evidence on the question of whether the attorneys were entitled to their fee, the trial court considered the Tribe's Resolution which constituted an admission that the fee was due and owing. But the District Court did not hold that the resolution, standing alone, legally "foreclosed" the Tribe from disputing the fee. See District Court Order, Tribe's Petition at 12a-14a.

The Tribe further distorts the District Court ruling by asserting that it holds that "the successful settlement in the underlying litigation cured the firm's documented misconduct." Petition at 24. In truth, the District Court neither found in the record any "documented misconduct" nor ruled

that a successful settlement would "cure" such misconduct if it existed. Id.

The record establishes that the attorneys prosecuted the Tribe's claims for more than ten years, eventually realizing settlements having a present value to the Tribe of more than $20 million. The attorneys thereby became entitled to the maximum fee permitted by the contingent fee contract. The Tribe acknowledged this entitlement in writing. But, in this lawsuit, the Tribe has attempted to rewrite history: first, by making factual allegations that find no support in the record; and then by mischaracterizing the lower court rulings. This process should go no further. The petition for a writ of certiorari should be denied.

III.

ARGUMENT AGAINST ISSUANCE OF A WRIT OF CERTIORARI

This case presents no issue meriting Supreme Court attention. The lower court decisions involve nothing more than the application of established state law to the facts of

this particular case. Neither the District Court nor the Court of Appeals decided any question of law in a way that conflicts with the decisions of the Supreme Court or any other federal court.

A. NO ISSUE OF PUBLIC INTEREST IS PRESENTED

Unquestionably, the outcome of this matter is important only to the litigants. Rather than deciding any new or controversial legal question, the District Court and Court of Appeals opinions focus on the peculiar facts of this case: the unique terms of the contingent fee agreement and the Tacoma and Centralia settlements; the calculation of the present value of the settlements and the attorneys' fees; and the Tribe's written admissions that the attorneys were entitled to their fee. To reach their decisions, the lower courts needed only to apply existing Washington law to the undisputed facts. The District Court and the Court of Appeals rejected the Tribe's arguments simply because the Tribe failed to produce evidence supporting its allegations. Because the lower court

rulings were driven primarily by the unique facts of this case, those rulings have no application to other disputes and parties. In deciding that their opinions would not be published, the District Court and the Court of Appeals clearly signalled their conclusion that this matter involves no issue of broad public interest.

B. NO FEDERAL QUESTION IS PRESENTED

Neither the District Court nor the Court of Appeals decided any question of federal law. Until now, both the Tribe and the attorneys have consistently taken the position that Washington State law applies to this dispute. See, e.g., CR 283 at 6 ("The Firm agrees with the Tribe's assertions . . . that RCW 60.40.010 et seq., Washington's attorney lien statutes, apply in this proceeding"). The District Court opinion rests entirely on state law, citing not a single federal case or statute. Similarly, the Court of Appeals relied exclusively on state law in deciding all substantive issues.

In its Petition for Writ of Certiorari, the Tribe argues, for the first time, that there should be "a federal common law rule that fiduciary duties of full disclosure are necessary to protect clients directly in the attorney-client relationship." Petition at 25-26. This is a transparent, eleventh-hour attempt by the Tribe to fabricate a "federal question" so as to obtain Supreme Court review. The attempt should not succeed. First, Supreme Court Rule 10 contemplates that a writ of certiorari will issue with respect to a federal question only after that question has been decided by a Court of Appeals or state court of last resort. Here, neither the District Court nor the Court of Appeals was called upon to decide the existence or scope of any "federal common law rule" of full disclosure. Instead, the Tribe presented the attorneys' fiduciary duty issue as a question of state law and relied on Washington State law in making its arguments. See Brief of Appellant to Court of Appeals at 23-26. As discussed above, the lower courts decided this case based upon

state law. The Tribe should not now be permitted to assert that federal substantive law applies when the Court of Appeals has never been presented with that question.

Furthermore, the Tribe makes no showing that the result in this case would be altered in any respect by application of a "federal common law rule." The Tribe failed in the lower courts, not as a result of an adverse ruling on any question of law, but, rather, because of a paucity of evidence that the attorneys engaged in any misconduct. Petitioner cites no federal authority that would remedy that problem or turn permissible conduct under state law into a breach of any "federal common law rule."

Equally unavailing is the Tribe's contention that "federal common law establishes economic principles governing actual present value calculations." Petition at 28. Again, petitioner's claim that this matter presents questions of federal common law is not only new; it is contrary to the Tribe's position in the lower courts that Washington State

law is controlling. At no time did the Tribe argue to the District Court or the Court of Appeals that there is any federal common law that governs how settlements are to be valued for the purpose of calculating attorneys' fees. It is inappropriate that this argument is being made for the first time in a petition for a writ of certiorari.

Moreover, the Tribe fails to demonstrate the existence of any pertinent federal law. At issue here are (1) the enforcement of a contingent fee contract and (2) calculation of the present value of a settlement. The federal cases cited by petitioner have nothing whatever to do with either one of these questions. The case upon which the Tribe principally relies, Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S. Ct. 2541, 76 L. Ed. 2d 768 (1983), deals exclusively with the calculation of damages under the federal Longshoreman's and Harbor Worker's Compensation Act, 33 U.S.C. § 904, et seq. The case does not address, explicitly or implicitly, how attorneys' fees or the values of

settlements are to be calculated. Similarly, Monessen Southwest Ry. Co. v. Morgan, 486 U.S. 330, 108 S. Ct. 1837, 100 L. Ed. 2d 349 (1988), is limited to the issue of how damages are to be calculated under the Federal Employer Liability Act, 45 U.S.C. § 51, et seq. It is fanciful to contend, as does the Tribe, that these cases, interpreting and applying federal compensation statutes, create any common law rule governing the calculation of attorneys' fees under a contingent fee agreement. Certainly, nothing in these cases supports the Tribe's position that, in valuing a settlement, large cash payments to the claimant may be treated as having no value.

C. NO CONFLICT EXISTS BETWEEN THE COURT OF APPEALS DECISION AND THE DECISIONS OF OTHER FEDERAL COURTS

Petitioner does not contend that the decision of the Court of Appeals conflicts with any decision of the Supreme Court or any other federal court. In fact, petitioner fails to identify any other federal court decision addressing the

attorney-client and contract issues decided by the Ninth Circuit in this matter. Supreme Court review is not necessary either to resolve a conflict among the Circuits or to resolve any important question of federal law.

IV.

CONCLUSION

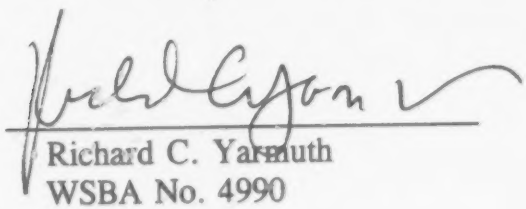
In the courts below, petitioner argued numerous state law claims purportedly justifying the Tribe's refusal to perform its obligations under the contingent fee contract. Those claims were rejected by both the District Court and the Court of Appeals because petitioner was unable to present any evidence supporting its allegations. In its Petition, the Tribe continues to advance unsubstantiated factual allegations, mischaracterizes the lower court decisions, and presents, for the first time, spurious questions of federal law. But the fact remains —— this case involves no issue of law

meriting review by the Supreme Court. The petition for a writ of certiorari should be denied.

DATED: June 15, 1994.

Respectfully submitted,

CULP, GUTERSON & GRADER

By: 

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